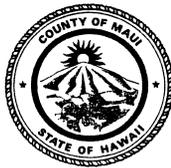


CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Acting Corporation Counsel

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January 23, 2007

MEMO TO: Michael Molina, Chair
Land Use Committee

F R O M: James A. Giroux, Deputy Corporation Counsel

SUBJECT: **CHANGE IN ZONING AND PROJECT DISTRICT PHASE I
APPROVAL FOR "HONU'A'ULA/WAILEA 670" RESIDENTIAL
DEVELOPMENT (LU-38)**

This memorandum is in response to your memorandum, dated October 11, 2006, which states, in part:

Following the October 4, 2006 Land Use Committee meeting, a Committee member requested that your Department opine whether the fact that the Piilani Highway extension is no longer planned for construction by the State Department of Transportation would require the application to be returned to the Maui Planning Commission for review.

Our Department has reviewed:

1. Maui Planning Department's Report to the Maui Planning Commission October 30, 2000 Meeting, page 37;
2. Minutes of the October 30, 2000 Meeting of the Maui Planning Commission, pages 25, and 27-29;
3. Maui Planning Department's Report to the Maui Planning Commission October 23, 2001 Meeting, pages 6-7, and Exhibit C; and
4. Minutes of the October 23, 2001 Meeting of the Maui Planning Commission, pages 118-119, and 123-124.

These documents were attached to your October 11, 2006 memorandum.

I. Background.

Mr. Charles Jencks, on behalf of WCPT/GW Land Associates, LLC, has requested a change in zoning from Agriculture and Open Space to Kihei-Makena Project District 9 (Wailea 670) for approximately 267.65 acres, and to amend the conditions of Ordinance No. 2171 and Unilateral Agreement for Kihei-Makena Project District 9 for 402.35 acres at Tax Map Key Numbers: (2) 2-1-008:056 and (2) 2-1-008:071, Wailea, Kihei, Maui, Hawaii. Mr. Jencks also seeks Phase 1 project district approval, consisting of repeal of Chapter 19.90, Maui County Code ("MCC"), pertaining to Kihei-Makena Project District 9 (Wailea 670), and adoption of new Chapter 19.90A.

The land use amendments are proposed in order to develop Wailea 670, comprising 1,400 residential units, an 18-hole golf course, related facilities, and a commercial area and mixed-use district.

The Maui Planning Commission reviewed the application on October 30, 2000 and October 23, 2001. The Maui Planning Department's Report to the Maui Planning Commission October 30, 2000 Meeting, included the following statement:

According to the applicant, the Wailea 670 community, upon build-out, will have a minimal affect on traffic in the area if all planned State and County roadway improvements are completed as scheduled. These improvements include: the widening of Pi'ilani Highway to four lanes between Mokulele Highway and Wailea Ike Drive and the extension of Pi'ilani Highway through Wailea 670 and up to Ulupalakua Ranch.¹

On October 23, 2001, the Maui Planning Commission voted to recommend approval of the land use amendments, subject to certain conditions. The Planning Commission's recommendations were transmitted to Council on November 30, 2001. One recommended zoning condition was:

That Wailea 670, its successors and permitted assigns shall contribute its pro-rata share of transportation improvements as determined by the Department of Transportation and the Department of Public Works and Waste Management to include, but not be limited to widening of Piilani Highway to four lanes, the future extension of Piilani Highway through the project district, and intersection improvements such as installation of traffic signals. Said improvements shall

¹ Maui Planning Department's Report to the Maui Planning Commission October 30, 2000 Meeting, at 37.

be determined by the Department of Transportation and Department of Public Works and Waste Management and shall be coordinated with the Planning Department and shall be concurrent with each phase of the Wailea 670 development.

In a letter dated August 12, 2005, Rodney K. Haraga, State Director of Transportation, informed Mr. Jencks that "[t]he State has no plans to construct the Piilani Highway extension."

II. Processing change in zoning and project district applications.

MCC Section 19.510.040(A) states, in relevant part:

A. All applications for change of zoning shall be processed as applications which require a public hearing in accordance with the procedures set forth in sections 19.510.010 and 19.510.020 of this code and the following requirements:

1. The appropriate planning commission shall conduct a public hearing on all change of zoning applications;

2. Upon closing the public hearing and upon reviewing the report and recommendation of the planning director and all other applicable information on the application, the commission shall prepare a report which includes, but which is not limited to, the commission's findings of fact, conclusions of law, recommendations, and any recommended condition which the commission determines to be necessary pursuant to the conditional zoning provisions of this chapter;

3. Upon appropriate action by the commission, the director of planning shall transmit the report of the commission to the county council;

4. The county council may grant a change of zoning if all of the following criteria are met:

a. The proposed request meets the intent of the general plan and the objectives and policies of the community plans of the county,

b. The proposed request is consistent with the applicable community plan land use map of the county,

c. The proposed request meets the intent and purpose of the district being requested,

d. The application, if granted, would not adversely affect or interfere with public or private schools, parks, playgrounds, water systems, sewage and solid waste disposal, drainage, roadway and transportation systems, or other public requirements, conveniences and improvements,

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e. The application, if granted, would not adversely impact the social, cultural, economic, environmental, and ecological character and quality of the surrounding area.

....

Section 19.45.050, MCC, states in part:

Development of a project district shall be subject to the following three phases of approvals.

A. Phase I approval shall be processed as follows:

1. After receiving an application for a project district development, the planning director shall submit to the planning commission one or more proposed project district ordinances, which provide project district zoning district standards including permitted land uses, accessory uses, densities, heights, setbacks, and lot dimensions. The planning commission shall hold a public hearing on the proposed ordinances in the affected community plan region. After the public hearing, the planning commission shall submit its recommendations and the proposed ordinances to the council. The council may approve the ordinances with or without modifications.

....

III. Analysis and conclusion.

The Maui County Code is silent as to procedures to be followed when, with the passage of time, circumstances change and facts pertaining to pending land use applications vary from those applicable at the time of original filing. Such changes in facts and circumstances are not unexpected given that neither the Revised Charter of the County of Maui (1983), as amended, nor the Maui County Code place a time limit on Council consideration of zoning bills and other land use ordinances initiated by a private applicant.

In the absence of law specifically addressing the legal issue posed, and given that zoning is fundamentally a legislative act,² it remains for the Council to review changes to facts pertaining to the subject land use applications and project, and to determine what weight to assign to such changes. In the exercise of its legislative function, the Council may, if it deems appropriate,

² Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawai'i 465, 474, 78 P.3d 1, 10 (2003) ("Accordingly, we conclude that a zoning ordinance is a legislative act and is subject to the deference given legislative acts.")

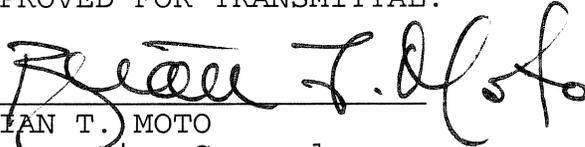
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refer the applications back to the Maui Planning Commission for further review in light of Director Haraga's 2005 statement regarding the Piilani Highway extension. However, such a referral is not mandatory.

JAG:ln

cc: Jeffrey Hunt, Planning Director
Colleen Suyama, Deputy Planning Director
Michael Hopper, Deputy Corporation Counsel
Michele White, Legal Assistant

APPROVED FOR TRANSMITTAL:

A handwritten signature in black ink, appearing to read "Brian T. Moto", is written over a horizontal line.

BRIAN T. MOTO
Corporation Counsel

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